In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, PETITIONERS,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY and the Northern Pacific Railway Company. } No. 748.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR UNITED STATES.

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THE NORTHERN PACIFIC RAILROAD COMPANY and the Northern Pacific Railway Company. } No. 145.

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BRIEF FOR UNITED STATES.

CHRONOLOGY.

NORTHERN PACIFIC RAILROAD.

July 2, 1864. Grant of lands eastward from Portland.
Mar. 6, 1865. Perham map transmitted to Secretary of Interior.
May 31, 1870. Grant of lands northward from Portland.
Aug. 13, 1870. General route maps of entire line filed.
Sept. 20, 1870. } Notices of withdrawal along general
Nov. 21, 1870. } route.
Sept. 13, 1873. } Maps of definite location filed.
Sept. 22, 1882. }
Sept. 29, 1890. Forfeiture act passed by Congress.
May 23, 1895 } Patents to lands in controversy issued.
May 27, 1895. }

July 25, 1866. Grant of lands.
Jan. 29, 1870. Map of definite location accepted.

This case, involving title to lands near Portland, was certified to this court by the circuit court of appeals of the Ninth circuit, for a determination of the following questions:

1. Did the Perham map which was transmitted to the Secretary of the Interior March 6, 1865, and the maps filed by the Northern Pacific Railroad Company in the office of the Secretary of the Interior on July 30, 1870, sufficiently designate as between the grantor and the grantee of said land grant to said railroad company of July 2, 1864, the boundaries of the grant in aid of that portion of the road which was described as the branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, so that none of those lands were included in the subsequent grant by the joint resolution of May 31, 1870, in aid of the line of road from a point at or near Portland to a point on Puget Sound?

2. Are the appellees estopped by reason of the filing of said maps to deny, as against the suit of the United States, the sufficiency of the said maps to designate the boundaries of that portion of the grant of July 2, 1864, in aid of said branch line?

3. In view of the facts referred to and recited in the questions above, was it the intention of the joint resolution of May 31, 1870, to include in the grant in aid of the line of road, from a

point at or near Portland to a point on Puget Sound, any of the lands within the place limits of the line so designated on said maps?

The whole cause is now before the court upon certiorari.

The three questions certified by the circuit court of appeals show that that court was not troubled, as was the trial court, with the precedent supposed to precisely fit this case, viz, your decision in *United States* v. *Oregon and California* (176 U. S., 28), concerning lands overlapped at Portland by the Perham map and the Oregon and California grant south from Portland.

The trial court was misled by apparent similarities, which the court of appeals rightly ignored.

It perceived that the questions are wholly different, as are the facts.

Accordingly, this case should not be regarded as burdened with an adverse decision below, no reason whatever having been given for deciding it against the Government. It was argued, it seems, that Congress had not *power* to grant lands covered by a map of general route, and the trial court responded to that argument by merely citing the Oregon and California case to the contrary. The argument and response were wide of the mark.

The facts in this case differ from those in the Oregon and California.

The facts in the other case were that lands in a quadrangle southeast from Portland, lying within the boundaries of the Oregon and California grant of

1866, definitely located in 1869, road built immediately after, were claimed to be within the grant of 1864 to the Northern Pacific along the Columbia Valley to a point at or near Portland, as to which grant nothing had been done prior to such definite location except file the rejected Perham map, and the suit arose after the forfeiture act of 1890, when it was clear that no definite location or construction could ever take place. The question was, did the definite location and construction of the Oregon and California make the grant to that company carry the lands in view of such a state of facts? It was held that it did because the Perham map did not prevent Congress from having power to grant the lands to the Oregon and California and Congress had done so.

Certainly, in view of the character of the Perham map, in view of the actual and timely construction of the Oregon and California, and the failure of the other company to file even a proper map of general route, that may be said to be one of those good cases such as sometimes make bad precedents.

We do not say that this was a bad precedent, but only that it should not be carried beyond the particular points decided.

What then were the particular points decided?

That Congress can, if it sees fit, grant to a second grantee lands covered by such a map as the Perham map of 1865, even assuming it to be a good map of general route, which was not believed, and Congress had made such a grant in 1866 as would carry the

lands in 1869, in view of the failure of the first grantee to file a map of definite location before the forfeiture act of 1890.

Now, what are the facts in the present case?

We have a different Northern Pacific map, that of 1870, an actual withdrawal of the lands for that company, a different second grant, a Congressional elimination of doubtful elements as to the terminal point of the first grant at or near Portland, and *a peculiar and exceptional arrangement* between the Government and grantee to interpret, no question as to the superiority of the rights of one grantee over another under certain circumstances, but a pure question of Congressional intent in making that peculiar arrangement involving a second grant to one grantee to construct *one* road upon a modified scheme.

There is no overlap in this case, but a peculiar single scheme concerning one road and one grantee.

We need not dispute the power of Congress as affirmed in the other case or that Congress in such a grant as was there made intends to exercise it so as to give the later and diligent grantee the lands in the overlap under the circumstances there existing.

In this case the existence of an overlap is disputed, and the necessity for and intent of Congress to use its power as in the other case are denied.

We do not see how it could have been assumed by the trial court that these questions as to the true interpretation of the peculiar single arrangement of 1864–1870 between the Government and the Northern Pacific

Company could be settled by a decision which merely holds that Congress could and in a particular and wholly different case did give lands in an overlap of two grants of separate grantees for *two* roads to the second and diligent grantee. Nor did the court of appeals see how this case could be so decided.

We know of no case which does rule the present one. The facts are, as we have said, peculiar. In 1864 Congress made a grant to the Northern Pacific Company for a road from the east along the Columbia Valley to a point at or near Portland. Portland is just south of the river. The Perham map purported to locate the line and fixed Vancouver as the point near Portland, and this map was claimed as a good map of general route or of definite location and known to Congress as so claimed until the decision of this court, in 177 U. S., to the contrary. Next, in 1870, Congress made what has been held to be a new grant to the same company northward to Puget Sound, in order that a continuous line from the east via the Columbia Valley to Puget Sound should be constructed.

Does it follow because Congress may intend separate grants to separate companies to carry lands to one or the other in case of the diligence of one and inaction of the other, where the two grants might overlap, that it intended a first grant to a company and an additional grant to the same company, to construct *farther on* upon a continuous line of road, to give rise to any overlap or any possible competition between the two grants?

It seems to us the contrary is the natural intent to presume—that the second grant was to begin beyond the first, and by no possibility to overlap it and compete with it. It was made not independently of the first, but in view of it and as part of one scheme and was to be added to it.

Where there are two grantees with two separate roads, the contrary supposition is perhaps natural. They are strangers to each other, and the arrangement with one for one road has nothing to do with the contract with the other for another road. The schemes are not fitted into each other as one scheme. No attention is paid in arranging the second to the first. The language of the second is written as is the language of a grant where there is no first scheme. The companies are rival constructors. The Government has an interest in their rivalry and their diligence. The overlapping lands are under some circumstances a prize to stimulate their hopes. But it certainly has no interest in rewarding the same grantee for failing to carry out its contract under its first grant for the same road.

Certainly Congress *may* have a different intent when it makes a grant to another company for a distinct road from that which it has when it makes a second grant for a continuous road to the same company. Conceding that its intent to make a second grant of the same lands to the Oregon Company, a separate and rival grantee, was natural, so long as and on condition that there was an absence of the map of

definite location required by the granting act, it clearly does not follow that Congress did not consider in another light its second grant to the Northern Pacific Company for the same road.

The intent of the scheme of 1864–1870 can not be found by reading the Oregon and California case. Every granting act is a separate law and its intent is to be separately inquired into.

At different times to different grantees for different roads having nothing to do with each other as schemes of Congress, that body would have intents and a lack of intents accordingly; and in such cases it follows a set phraseology which ignores particular prior grants; but when it took up again in 1870 the old scheme of a road by the Northern Pacific Company and considered and modified that one scheme so as to provide for a single road from the East via the Columbia Valley to Puget Sound, it then *intended* to make an additional grant beyond where it then *expected* the first to end, which was *at least* 40 miles north of Portland, and as it no more had an expectation that the *one* road would be left unconstructed *near Portland* than it expected it to be so left at any other point on the line from the East to Puget Sound, it did not have the intent that what would thereby fail to pass under the first grant should be overlapped by and pass under the second. In 1870 it expected the one company to carry out the one scheme and did not contemplate a certain *partial* failure of it near Portland; whereas when it deals with two companies about two distinct roads and schemes,

it may perhaps contemplate the failure of one scheme as a whole, and its *intents* are based upon its knowledge and expectations. So, in 1866, when it made the Oregon and California grant, Congress had reason to contemplate that the whole Northern Pacific grant might fail, especially as nothing had been done but file the Perham map, and might well have considered the possibility of the Oregon Company taking the lands in the Portland overlap; but it had no reason in 1870 to contemplate a partial failure by the Northern Pacific Company to occur at Portland or at any other particular place, and had no intent based upon such an expectation.

The first grant took the road down the narrow valley of the Columbia River, in which it was to remain until it reached a point in that valley near Portland, to be selected by the company, unless it saw fit to leave the valley opposite Portland to the extent only of going into Portland. It was given no grant for a line *outside* of the valley of the Columbia River, and the point near Portland was evidently intended to be in the Columbia Valley. Portland itself is almost in that valley. The phrase "at or near Portland" evidently meant Portland or a point opposite Portland in the Columbia Valley. We do not see why the fact that Portland was an important commercial point, and the only one in the neighborhood, should be ignored in interpreting the phrase "at or near." Of course the company desired and the Government desired that the terminus should be at Portland, or practically so, in

order to get the business of that place and increase its business importance. In at or near, the near means, evidently, a very near point on one or other side *of the river*. It does not mean a point forty or fifty miles from Portland and certainly not a point south of Portland. The road would not terminate at a distance from the *river* commerce unless it did so *at* Portland, to get the commerce of that important place. From the point at or near Portland the road was to follow the narrow valley east.

The second grant was practically at right angles with the first, since the road was to follow the most direct route from Puget Sound to the connecting point. When the second grant was made it is clear from its terms that the connection of the two parts of railroad was expected by Congress to be either at Portland or immediately north thereof in the valley of the Columbia River, that is, on the river, for in the second grant the road *between Portland* and Puget Sound is required to be built within a certain time.

We thus have a line from Portland or just north of it in the valley of the Columbia east along the valley of the Columbia River and a line from the same point north. With all this in the mind of Congress, it is obvious that the first grant was understood by it to lie along the Columbia River and reach to Portland or a point on the Columbia River immediately north thereof. Could it have been the intention of Congress, in making the second grant to the same company, to include in that second grant the lands in question, all of which

clearly lie within 40 miles of the east and west line and within 40 miles of the north and south line? Must we not, on the contrary, understand that Congress in 1870 regarded these lands in suit as obviously in the first grant, and therefore that it had not the intent to grant them by the second grant?

It seems to us that no reasonable theory can cause any mind to ignore the obvious conception of Congress with regard to these lands. The facts are plain, and there is no unbending rule of law that we are aware of which requires them to be ignored. If a similar case arose between two neighboring farmers, an attorney would hesitate to ask that such things be ignored in determining their respective intents and equities. But we rely upon some of these considerations only in view of the fact that they are supplemented by others which were not in the Oregon and California case.

The Government is equitably entitled to some quadrangle as falling within the grant of 1864.

A line of road from due east was to end where a line of road from due north was to begin—at the same point. This was the situation down to 1890 and when the map of definite location of the second grant was filed. Now, wherever that point might have been, it was but one point for both roads, one reaching it from the east and one from the north. The right to locate the first continued down through the definite location of the other. Does it not follow from this that a quadrangle of lands equal in *quantity* to the quadrangle we here contend for was necessarily intended to

be omitted from the second grant? And if that is so, is it not equitable that we should recover in this suit, upon the extreme probability that the quadrangle we contend for is the right one, and is it not inequitable that this company should have so large a quantity of our lands in excess of the *quantity* intended to be granted? Is not the company, by definitely locating the road under the second grant to the point to which it did locate it, estopped to question the location of that quadrangle?

The knowledge and expectations of Congress in 1870 gave rise to and can interpret its intent in passing the resolution of 1870.

We need not insist that, for the purpose of passing "absolute title," anything less than a map of definite location would have sufficed, because Congress sees fit to expressly require such a map *for that purpose.* Nor need we insist that the language of the two grants and geography of the country sufficed to definitely locate the grant for any purpose; but we emphatically do insist that these things, coupled with the map of 1870, fixing the point at or near Portland and identifying particular lands—all these things, including the filing of such a map, being in contemplation and intended by Congress when it made the grant of 1870—sufficiently determined the lands Congress expected to have withdrawn and reserved and finally taken for the company under the act of 1864, and that it did not intend to deal with them again in making the grant of 1870 to the same company to have it continue the road to Puget Sound.

The resolution of 1870 provided for a road continuous of the original road; that is to say, the company was to construct "its main road to some point on Puget Sound via the valley of the Columbia River," and to speedily build so many miles "*between Portland* and Puget Sound." We thus have the peculiar condition of affairs that the road is continuous and the grants are separate and distinct. The second *grant* is not from Portland or to Portland. Its beginning is not expressly mentioned. It ends at Puget Sound. The *road*, however, is to be built to Portland. But as the resolution of 1870 is a separate grant and the road is continuous, it seems to be clear that what Congress had in mind was to make an additional grant beginning (that is, the half of it lying on the *east* side of the line of road) where it then naturally expected the other to end, without any overlapping or conflicting. If the company had built the whole road it would have taken the lands in question here under the first grant, and only under the first grant. Title clearly would have passed in 1864 and not in 1870.

Congress expected in 1870 that one whole road would be built and had no expectation that at any particular point a failure would occur.

Congress expected the whole road to be built, and had no intention about an uncompleted road until 1890. Its intentions must be harmonized with its expectation of having a whole road built. If upon building the whole road the lands in question would not have passed under the grant of 1870, but under the grant of 1864,

how can we attribute to Congress an intention to grant them under the resolution of 1870 because it afterwards turned out that the whole contemplated road was not built but a stoppage occurred at a particular point? Can a different meaning be given to the second grant because the company afterwards built only part of the road from that which it would have if it had built the whole road? It is just as clear that Congress intended a whole road and a continuous road as it is that it intended two separate grants along that road. It had no intention about these separate grants except as grants upon the continuous road. It had no intention to grant the same land twice, and having granted these lands by the act of 1864 upon a part of the continuous road, it had no intention to affect them in 1870, but merely made a separate grant so that the two grants might be adjacent ones along the continuous road. And it did not intend one grant to take provisionally by a map of general route what it obviously expected the prior grant to take provisionally by such a map and finally.

As we have said, in granting lands at different times to two grantees for separate roads Congress may contemplate and act upon the possibility that one road will not be built. In 1866, after two years, the Northern Pacific had done nothing when the Oregon grant was made; therefore Congress might contemplate and *provide for* a possible overlap. But it is not to be supposed that in making a grant or grants for one continuous line Congress contemplates the nonconstruction of part of it, and least of all that it has in

mind a noncompletion from any certain point on the one road. Congress, of course, no more expected in 1870 that the Northern Pacific Company would fail to build under the granting acts *near Portland* than that it would fail to build anywhere else. Consequently, the possibility of a failure in an *overlap* of the additional grant and that of 1864 was not contemplated, provided for, or the basis of any intent, and no overlap was intended to exist. The Oregon and California grant was not to be added to the Northern Pacific, but the grant of 1870 to Puget Sound was unquestionably to be added to and not to overlap the grant of 1864 to the Northern Pacific Company.

The first certified question, Whether the maps of 1865–1870 sufficiently identified the grant of 1864, as between grantor and grantee, to exclude the lands from the grant of 1870.

1. The first certified question, then, would have been easily answered in the affirmative.

The maps of 1865 and 1870, and the actual withdrawal of 1870, do not need to vest "absolute title" in order to show what lands were *not* intended to be given and taken under the grant of 1870. They all fix upon Vancouver as the point at or near Portland, and go east along the Columbia River. That being a separate grant from this of 1870, and the end of the expected location of this one on the continuous road being the intended beginning of the other, we thus have clearly demonstrated the beginning of the second grant as intended by Congress.

It begins beyond all of the lands in question, which are consequently not carried by it and never have ceased to belong to the United States.

It will be observed that the resolution of 1870 does not expressly make a grant from any point, but assumes that the beginning of the grant will be ascertainable. Does not this confirm the theory we are insisting upon that the second grant was intended to begin where the first grant was expected or understood to end? Congress could have said "from Portland" or from the *point* selected under the act of 1864, and this might have made an overlap. Had the second grant been to an independent grantee for a separate road Congress would have so expressed itself.

What is there in the case of *United States* v. *The Oregon and California*—what is there in the power of Congress to grant to one grantee what it has provisionally or partially granted to another independent grantee at another time for another road, that throws any light upon these propositions? Absolutely nothing.

The second certified question, Estoppel.

2. The second certified question, as to the "estoppel" of the company, would have been equally easy to answer.

Here have remained the Perham map and the map of 1870, and the requested withdrawal of 1870, for a quarter of a century or more, preventing up to 1890 the settlement of the country, which was one of the principal objects of the grant, and it does not lie in the mouth of the company at this late day, and after

settlement has taken place upon the faith of such maps and withdrawal, to say that the maps of 1865 and 1870 (which were identical at Portland, and without leaving the Columbia Valley could not well have differed), does not show the boundary of the grant of 1864 and, consequently, the boundary of the grant of 1870.

The company has had the full benefit in credit and opportunity afforded by the maps and withdrawal, and the Government and public it represents the loss and disappointment occasioned by its conduct. This is a court of equity, and will not listen to the proposition now that the boundary of the grant of 1870 was not where it has so long been represented by this conduct to have been. It will not, now that there can be no definite location, listen to the proposition that the company *might* have changed its mind to some extent as to the point at or near Portland on the Columbia River. There is no presumption that it would have done so, and as it has ceased to have the power, this court of equity will hold it to its choice, in order to accomplish equity between the parties.

For is it not inequitable to deprive the Government of these lands in suit when they lie well within every possible definite location conforming to the granting act—when the court knows that some such quadrangle of lands near Portland was not intended to be given or expected to be received or earned under the second grant of 1870, but to be forfeited, if the road should not be built, for noncompliance with that of 1864?

The very geography of the country, without any maps, demonstrates that the sections in suit are necessarily within the boundary of such lands, whether that boundary is considered as precisely fixed by the withdrawal or not. Will not a court of equity seize upon some means of fixing a boundary in such a case, or will it turn over all the lands to the party it knows was not intended to have them, merely because through his fault the boundary is not precisely known?

If it is not so precisely fixed, but in doubt, what gives the company the superior right to have the lands as properly passing under the grant of 1870 instead of the Government's retaining them as falling under the grant of 1864? If one grant was not intended to embrace lands expected to pass provisionally, and afterwards finally, under the other, and if the boundary of the first is in doubt, the same doubt must exist as to the limits of the adjacent one separated from it by that boundary.

What is not clearly and unmistakably granted belongs to the Government and it is error to patent it away. Doubt must make the grant fail. This is a familiar principle of land-grant law.

In *United States* v. *Southern Pacific Railroad* (146 U. S., 598), the court, in discussing the doctrine that, as a granting act is a law as well as a grant, and subsequent definite location under a prior grant displaces a title acquired by a prior location under a subsequent grant, says:

> So now, whatever may have been the dates of filing by the respective companies, the case

> stands as though the lands granted to the Atlantic and Pacific had been identified in 1866, and title had then passed, and there never was a title of any kind vested in the Southern Pacific Company.

So we say here, the Northern Pacific Company having located its grant by a map of general route which might possibly have been altered prior to 1890, "the case stands" as if that power had never existed and the location was a final one. This does not make it a compliance with the requirement of a map of definite location, in order to get absolute title to the lands withdrawn, but precludes the company from alleging that its grant was elsewhere than where it was located, in order to enlarge its second grant.

Where a granting act provides for a map of general route as well as a map of definite location, it provides for the passing of a provisional title to particular lands and for the passing of an absolute title to the same or other lands. When the map of general route is filed, the absolute title may well be regarded as a float, but the partial title can not be so regarded, because a float is a title to unidentified lands, and lands withdrawn under a map of general route are identified.

The company acquired a provisional title to particular partly surveyed lands by filing its map of 1870, and has long since ceased to have any right to acquire anything further or different, had such been attempted.

It might be contended that Congress did not intend the provisional map to establish the final boundary of this grant, because it provided for a final map of

these lands at Portland, which might at least slightly and theoretically have differed from this one. But it did intend the provisional location to furnish at least a provisional boundary, and in this suit between the Government and the company, what is to be the result of the failure of the company to fix the final boundary? Can the company say that Congress intended the map of *definite location* to furnish the final boundary and, there being no map of definite location, we are to take the second grant as intended to carry lands all the way down to and across the Columbia Valley?

If that is so, the company clearly gets lands under the second grant merely because it failed to carry out its contract under the first. Undoubtedly there was to be *a* boundary of the grant of 1864, and it was to be nearly if not absolutely where the general route map placed it. Whether nearly or absolutely, it would certainly have included the sections in suit within the grant of 1864.

As to both the supposed provisional and supposed final boundary, Congress permitted the company to fix them. The company fixed one and might have fixed, but did not, the other. Is it right and just to permit it to ignore its own line of provisional boundary, and, asserting that there is no boundary, claim lands which were obviously intended to be in the first grant, and to be forfeited for noncompliance with its terms?

It is the fault of the company if we can find no better boundary than the supposed provisional one. It is the result of its own negligence and breach of

contract with the grantor. The company and not the Government should lose by it, if anyone.

By the Resolution of 1870, accepted by the grantee, "at or near Portland" was in effect altered to via Vancouver.

The resolution of 1870, which of course was not in the *Oregon and California* case, provides for a line via the valley of the Columbia to Puget Sound, and requires the road between Puget Sound *and Portland* to be constructed within a certain time. Portland is just below the valley of the Columbia and *not* on the way from that valley to Puget Sound. If the resolution means that the company was to build to Portland, notwithstanding its route and grant are prescribed as *via the valley* to Puget Sound, what was the scheme of Congress and this company?

It seems to us that the Perham map, whether sufficient as a map of general route or not, was regarded as fixing upon Vancouver, just north of Portland, *in* the valley, as the point "near Portland" of the grant of 1864, and that Congress and the company, knowing that the first grant was to go to Vancouver and embrace lands on both sides *as far west* as Vancouver, intended to provide for a spur of railroad from Vancouver to Portland, but without disturbing the point *in the valley* from which the principal line and land grant were to go via the valley to Puget Sound. Doubtless the company had concluded to so proceed, and doubtless Congress was so informed. (See map of July 26, 1870.)

This theory reconciles the various parts of the resolution, and makes the resolution by amendment of the act of 1864 eliminate Portland from "at or near Portland." It also eliminates all points outside of the valley of the Columbia and all points *east* of the direct line from Puget Sound to Portland, since the roads were to *connect* or be a continuous road from the east via the valley to Puget Sound. Such eliminations, however, eliminate everything but Vancouver, and this confirms the natural theory that the Perham map and conduct of the company had in 1870 caused that point to be regarded as settled upon. This fixed Vancouver in 1870 as the terminus of the grant of 1864.

If not Vancouver, then Portland itself was fixed as the point by the resolution of 1870.

There is another reasonable interpretation of the act of 1870, namely, as amending that of 1864, with the consent of the grantee, by eliminating every point but Portland itself. The road is to reach from Puget Sound *to Portland.* The original road was to go to Portland *or* a point near it. From 1870 a continuous road from the East was to be built to Puget Sound. If the road was to be continuous and the part to be built under the second act was to end *at* Portland, was it not the intention of Congress that the other road, which was to continue it, should begin *at* Portland, and at Portland only? Could it have stopped several miles east or south of Portland? That might be *near* it; but what would then become of the continuity of the road from the east to Puget Sound? If the company could

not comply with the granting acts after 1870 by going thus to a point which is "near Portland," was not the act of 1864 amended by striking out "or near"? The survey of 1867, made for the company, crossed the river east of Portland and went to Portland; and in the debates of 1870 Portland, and only Portland, was mentioned as the terminus or connecting point.

By the Oregon and California grant all lands not "appropriated" were held to have passed. By the resolution of 1870, lands as to which there were any claims or rights were excepted. There was a claim or right under the act of 1864 when the grant of 1870 was definitely located.

But there is a theory, which seems to have been overlooked, equally conclusive of this case and constituting an answer to the third certified question. It concedes an overlap and would give indemnity lands to the company—a concession we do not consider necessary to make, or in accordance with the real facts and law of this controversy.

The terms of the grant to the Oregon and California and those of the joint resolution of 1870 (which adopts the terms of the act of 1864) are different. In the case of the Oregon road all lands not "appropriated" at the time of definite location were granted. This court so reads that grant, which contains the usual provision as to lands "granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise *disposed of*." Hence this court in *United States* v. *Oregon, etc.* (176 U. S., 28) assumes that the grant of

1866 passed at definite location all that Congress *was able* to grant (*ibid.*, p. 44). Only the Perham map had been filed when in 1869 the Oregon grant took effect by definite location, and although the Perham map indicated (if it was of any effect, which was doubted) a *claim* to lands under the Northern Pacific act of 1864, this did not prevent them from passing to the Oregon company, nor would a less vague and uncertain *claim* have had that effect.

But under the joint resolution of 1870 no grant was made of any lands except those "free from preemption or other *claims* or *rights*," at the time of definite location. Of this language the court says in *Northern Pacific Railroad Co.* v. *Musser-Sauntry Co.* (168 U. S., 608):

> Again, in the description are the words "free from preemption or other claims or rights." Certainly, after this withdrawal, the Wisconsin company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply "free from rights," but "free from claims," and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the

term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. (*Northern Pacific Railroad* v. *Sanders*, 166 U. S., 620; see also *Newhall* v. *Sanger*, 92 U. S., 761).

In the case of *Southern Pacific Railroad Company et al.* v. *United States* (189 U. S., 447), the land in controversy was within the place limits of the Southern Pacific and the Texas Pacific Railroad companies, being land situated where the road of the former company and the contemplated track of the Texas and Pacific met at Yuma, on the Colorado River, in the southeastern corner of California. The Texas Pacific filed its map of general route and the Secretary of the Interior withdrew the lands from sale. The Southern Pacific road was built, but the Texas Pacific was never constructed. The Government contended that the land was excepted from the Southern Pacific grant, and this court, affirming the decisions of both lower courts, upheld that contention.

In that case, the grant to the Southern Pacific provided that it should "in no way affect or impair the rights, present or prospective" of the Texas Pacific Company, and the court went so far as to hold that this proviso excepted from the grant to the Southern Pacific the lands within the limits of the Texas Pacific as identified by the map of general route, notwithstanding the fact that the Southern Pacific Company filed its map of general route prior to the filing of such a map by the Texas Pacific.

In our case, the map of general route of the "branch" line was not filed first. It is true that in our case we have not the same proviso, but we have a similar provision (that excepting claims and rights) and one which, for the purposes of this case, is as effective as was the proviso in that case. The fundamental principle involved in that case was precisely the same.

Definite location of the new grant from Puget Sound toward Portland took place in 1873–1882.

Were the lands in controversy free from "claims" in those years?

At that time the map of general route had been filed and the lands in question withdrawn under the act of 1864. Were not this unquestioned map and the actual requested withdrawal a claim to these lands? Were they free from a most substantial right, being place lands withdrawn?

Was there not the exceptional right secured by section 6 of the granting act, which the minority of this court in *Nelson* v. *Northern Pacific* (188 U. S., 109), charge the majority with nullifying—a charge which the majority will hardly admit to be true. What that right is the majority do not say, merely denying that it prevented homestead and preemption claims or prevented Congress from disposing of the lands. But it must have been a right and an important one, although not yet explained or defined by the court. One way to reconcile sections 3 and 6 would seem to be to treat section 3 as intending not to authorize homesteading and preemption up to definite location, but definite

location as merely the time *to look for* homestead and preemption claims originated earlier and before the grant, so as to have priority of right over the railroad company. This would allow section 6 to mean what it says. However, it must mean something, and will not be nullified but reconciled with section 3. It certainly gave some "right" or "claim" under the act of 1864.

It may be remarked, in passing, that the lands in our case were not all unsurveyed and that the map of general route may have had a different effect from that which it had in the Nelson case. What is supposed to be the meaning of a withdrawal; are lands *withdrawn* from something or from nothing, and if from anything, from what? And for a purpose or for no purpose? Are they not at least claimed?

If there was this claim under the act of 1864, then in 1882, when the new grant of 1870 took effect by definite location from Puget Sound southward, that new grant for a new road (*United States* v. *Northern Pacific*, 152 U. S., 294; *Northern Pacific Railway Co.* v. *De Lacey*, 174 U. S., 628) did not embrace these *claimed* lands. And if it did not, then of course it never after could or can embrace them. They, therefore, have never ceased to be lands of the United States. They were not claimed under a *subsequent* grant, but a prior grant, and the fact that the claim was under a railroad land grant is immaterial. It has been held that in excepting lands granted before definite location Congress did not mean to expressly

retain the power to afterwards grant the same lands to another railroad company, as this would be to give and by the same instrument retain the right to give to another all of the same lands. This, it was said, would be repugnant to the grant. But there is no repugnancy in excepting a claim arising under a prior railroad grant.

"All that we here hold is that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant, and made prior to the filing of the map of definite location by a company having a later grant, the latter having such words of exception and limitation as are found in the grant to the plaintiff, it operates to except the withdrawn lands from the scope of the later grant." (*North. Pac. R. R. Co.* v. *Musser-Sauntry*, 168 U. S., 604; *Southern Pacific* v. *United States*, 189 U. S., 447; *In re Northern Pacific*, 31 Land Dec. 32, and cases cited.)

So these lands were excepted from the resolution of 1870 because claimed under the act of 1864 at the time of definite location under the resolution—in 1873–1882.

The case of Sioux City R. R. v. United States is not in point. Each granting law has its individual intent or scheme.

It has been suggested that the case of *Sioux City, etc., R. R.* v. *United States* (151 U. S., 349), has some bearing upon the construction of the resolution of 1870. That case involves a second grant to the same grantee, as does the present one, and it was held that,

contrary to the general rule, the second grant intended to embrace lands which had been reserved for indemnity lands under the first grant; that the second grant was an enlargement of the first and carried the reserved lands. But that case was decided, as this should be, by inquiring what was the intent of Congress in making the particular grant in question in view of the subject-matter with which it was dealing, and whether any reason existed for supposing that Congress meant to depart from its general rules. Congress had made a grant to the State for a road between certain termini, and then, finding the road not constructed, made a wider grant to the State for the construction of the same road between the *same termini*. The contention was that certain indemnity lands which had been reserved under the first grant for the same road were not intended to be included in the second and wider grant. But it obviously was the intention to simply widen the grant. That obvious intention was held to control a settled rule that reserved lands do not pass. But what has the ascertainment of Congressional intent under those very exceptional circumstances, to widen a grant which it found insufficient to induce the building of the one road between two termini, to do with ascertaining the intent in our case?

No rule was laid down which concerns our case; but an exception to a rule was found to have been made by Congress under exceptional circumstances. In our case there are no circumstances to indicate that

Congress was departing from this rule and making another exception. The mere fact that the grant was to the same grantee did not control the court's decision that lands reserved for indemnity purposes were granted by the second grant. The reason of the court's decision was that the grant was for the same road between the same termini. Congress did not expect two roads to be built between those termini, but only one, and there was no possibility of regarding a mere indemnity reservation under an arrangement which had failed and was to be replaced by the new one, as intended to stand in the way of the wider grant. In our case the grant of 1864 was, in 1870, intended to be *fulfilled* by the construction of the road east of Portland precisely as it was originally contemplated and under penalty of forfeiture of the grant of 1864. The reservation for that road is of place lands. There is no proposition to widen the grant between the East and Portland. Both the first and second roads were intended to be constructed. There is not one road between the same two termini, but roads between different termini under two grants, the second of which was to leave the first intact, to be carried out as originally intended. In short, there is no resemblance between the two cases, and the intention of Congress in the one can not enlighten us concerning its intention in the other. The intention in the present is to be learned from the terms of the grant and the settled construction of the terms used. That intention must be held to conform to the general rule and to the plain language used, in the absence of a

very strong reason to the contrary. Is it such a reason that the two grants are to the same grantee? Why so? Why should not Congress except from the second grant what was claimed and to be earned or forfeited under the first? It might better be asked, Why should it do other than that? And why should the company have asked it to do otherwise?

After withdrawal and general route map substantial rights to particular lands vest, there is no longer a float, the lands cease to be public and are not intended to pass under the usual language in subsequent grants.

4. It has been held in divers cases by this court that the railroad grants pass title *in præsenti*, but that the grant is a float until definite location. This doctrine is well settled, but has led to a confusion which causes it to be again and again questioned. The confusion has arisen from somewhat loose use of words and from borrowing the language of some early railroad cases.

Float is not a statutory word, but is a mere convenient phrase to signify something floating or in the air. The idea may have originated in the old case of *Rutherford* v. *Green*, in which the grant to General Green of a quantity of lands in Ohio was held to pass the title *in præsenti*, but required identification of the lands to make it apply to particular lands. In the earliest railroad cases in which we find the word "float," *Railroad Co.* v. *Fremont County* (9 Wall., 89, 94), *Railroad Co.* v. *Smith* (9 Wall., 95), *Schulenburg* v. *Harriman* (21 Wall., 44), *Leavenworth, &c., R. R. Co.* v. *U. S.* (92 U. S., 733), *Missouri, K., &c., R. R. Co.* v. *Kansas*

Pacific (97 U. S., 491), *R. R. Co.* v. *Baldwin* (103 U. S., 426), *Grinnell* v. *R. R. Co.* (103 U. S., 739), *Van Wyck* v. *Knevals* (106 U. S., 360), *St. Paul R. R.* v. *Winona* (112 U. S., 720), the grant was made and the line of the road was to be "definitely fixed," without always saying *how*. The court said that there was a float until this definite fixing. These are the cases which have led to the frequent reiteration of the proposition that there is a float until a *map* of definite location is filed. We do not dispute that; but what does it really signify? In those cases, except the M., K. & T. case in 97 U. S., where under *one* of the grants a general route map was to be filed, there was no prior thing to be done before "definitely fixing"—no map of general route, no withdrawal of lands, nothing between the passing of the law and the "definite fixing" of the line. In many cases there are intermediate steps provided for, but in nearly all of such cases the question has been when did the title vest and become absolute. The granting acts have usually left no doubt of that; it vests absolutely upon definite location and by relation from the date of the acts.

But this does not answer the question, What are the effects of taking the intermediate steps? That is an entirely different question, and requires separate consideration. Those steps can not be ignored. They are as much a part of the law as the other, and Congress is not to be supposed to do vain things.

From other decisions it appears that there are an "absolute title" and an inchoate or provisional or less than absolute title.

If there are two titles, or a right of some kind in or to the lands, and an absolute title, we may naturally expect two operations affecting them.

Both pass *in præsenti* when the law is enacted. Both float. Each ceases to float. But when does the lesser right cease to float? We answer, when the lands are identified. And when are they identified? When the map of general route is filed and the lands withdrawn by or under it. Then that qualified title vests and reaches its perfection; it never changes or improves or becomes more settled.

In the nature of things, this is so. It is unnecessary to examine the opinions by this court to ascertain this, since neither the court nor Congress can make that a float which is not floating or uncertain, but settled.

Upon general route map filed and withdrawal the grant "*took effect* upon *such odd-numbered sections* of public lands within the specified limits as were not excluded from its operation." (*Newhall* v. *Sanger*, 92 U. S., 761.) "The company acquired, *by fixing its general route*, only an inchoate right to the *odd-numbered sections* granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. (*Shiver* v. *United States*, 159 U. S., 633.) Of course this means that a right is acquired to the odd-numbered sections along the general route, since it was the granting act and not the fixing of the general

route that gave an "inchoate right" to *unidentified* or unspecified sections.

For the court to say that the rights or the lands are floating after they are identified or settled would be to speak contradictions.

The words which have been somewhat loosely used are "grant," "title," and "lands." What is it that floats? Certainly not the grant as a grant. That is a law, complete, settled, and perfect from the beginning. It must be the title or titles, right or rights, or the lands. Sometimes this court speaks of the lands floating, as in the right of way case, in which the right of way was held to pass *in præsenti* and cut out a settler who went on before definite location, sometimes of the "grant," sometimes of the title. Is it not the lands that are supposed to float, since the title passes *in præsenti* and the granting act is complete when enacted? Neither of the *latter* need to be identified.

Now, when the act is passed, a right to file a map of general route and have lands withdrawn comes into existence. But no particular lands are affected by it. Are not particular lands affected by it after the map is filed? Has not the grantee a right in or to particular lands? Why not? And is it a float? How can it be so? Is it any less an actual, substantial right in or to particular lands, so far as it goes, than the absolute title to the lands as definitely located? Is that right, such as it is, completed and finished as to the lands it is to affect, or unfinished? In what respect unfinished?

It seems to us the court regards such rights, when directly involved in the case before it, as equally entitled to consideration with other rights, and that Congress did not intend in 1870 to grant lands which at definite location in 1873–1882 were affected by such rights under the first grant.

As a new question, Should not the court hold that withdrawal and general route map constitute definite fixing and vest title, subject to be divested by new map of company or subsequent Congressional action, but good otherwise, especially as between the grantee and the Government?

We might go even farther than this. A glance at the evolution of the doctrine that a grant may be *in præsenti* and yet not vest an absolute title in any land until subsequent action on the part of the grantee, is interesting in connection with determining what further development of the principle can be made without inconsistency and what effect a general route map and withdrawal can properly be given.

In the first case, that of *Rutherford* v. *Greene* (2 Wheat., 196), above referred to, the State of North Carolina had granted to General Greene 25,000 acres of land within the limits of a tract reserved for the use of the Army, to be laid off by commissioners appointed for that purpose. The suit turned on the title of General Greene and the date it took effect. The court, Chief Justice Marshall delivering the opinion, held the grant to be *in præsenti*, that the general gift of 25,000 acres became by the survey a particular gift of the

quantity contained in the survey, and concluded their opinion by saying the court was unanimously of opinion that the act of 1782 vested a title in General Greene, and that the survey gave precision to that title and attached it to the land surveyed.

The next case is *Lessieur* v. *Price* (12 How., 59). The act of Congress for the admission of Missouri into the Union provided "that four entire sections of land be, and the same are hereby, granted to said State for the purpose of fixing the seat of government thereon, which said sections shall, under the direction of the legislature of said State, be located as near as may be in one body, at any time, in such townships and ranges as the legislature aforesaid may select on any of the public lands of the United States." The court said:

> The land was granted by the act of 1820; it was a *present grant*, wanting identity to make it perfect, and the legislature was vested with full power to select and locate the land; and we need only here say what was substantially said by this court in the case of *Rutherford* v. *Green's Heirs* (2 Wheat., 196), that the act of 1820 vested a title in the State of Missouri of four sections, and that the selection made by the State legislature pursuant to the act of Congress, and the notice given of such location to the surveyor-general and the register of the local district where the land lay, *gave precision to the title* and attached to it the land selected.

In *Rice* v. *Railroad Company* (1 Black, 358–376) the court seems to think that the words "there shall be and

is hereby" granted are sufficient to constitute a grant *in præsenti*. The case, however, does not turn on that point. By the fourth section of the granting act it was provided—

> That the lands hereby granted to the said Territory shall be disposed of by said Territory only in the manner following—that is to say, no title shall vest in the said Territory of Minnesota, nor shall any patent issue for any part of the lands hereinbefore mentioned, until a continuous length of twenty miles of said road shall be completed through the lands hereby granted.

No road was built. Indeed, the granting act was repealed before the line had been surveyed and before the company had done anything more than to organize at the time and in the manner provided. The action brought by Rice in trespass was therefore, of course, sustained by this court. The granting act did not provide for any general route map.

In *Railroad Company* v. *Fremont County* (9 Wall., 89, 94), we first find the word "float" used in connection with a railroad grant. The question was whether certain land passed to the State under a swamp-land grant or whether it passed under a subsequent grant to aid in the construction of railroads. The language of exception in the railroad grant is held to exclude it from passing under that act. The court, however, takes occasion to use the following language:

> But there is still, if possible, a more decisive answer to the title set up by the defendants. Until the line of the railroad was *definitely fixed*

> *upon the ground*, there could be no certainty as to the particular sections of lands falling within the grant, nor could the title to any particular section on the line of the road vest in the company. The grant was in the nature of a float until this line was permanently fixed.

No general route map was provided *for* by the granting act.

Railroad Company v. *Smith* (9 Wall., 95) is a similar case, and relates to a controversy arising under the same acts of Congress.

The court says:

> The grants of lands by Congress to the States in aid of railroads have generally been made with reference to the lands through which the roads were to pass, and, as the line of the road had to be *located* after the grant was made, it has been usual in the acts making the grant to describe them as alternate sections of odd numbers within a certain limit on each side of the road when it should be *located*.
>
> This, of course, left it to be determined by the location of the road what precise lands were granted. So far as this uncertainty in the grant was concerned, it was one which might remain for a considerable time, but which was capable of being made certain, and *was* made certain, by the *location* of the road.

And further states:

> Congress has here given a criterion, apparently not difficult of application, by which to determine what was granted, to wit, such legal subdivisions of the public lands, the greater part

> of which were so far swamp and overflowed as to be too wet for cultivation. Now, here is *a present grant* by Congress of certain lands to the State within which they lie, but it is by a description which requires something more than a mere reference to their ownerships, ranges, and sections to identify them as coming within it. In this respect it is precisely like the railroad grants, which only became certain by the *location* of the road. In fact, in this regard the swamp-land grant was the more specific, for all the lands of that description were granted, and they have remained so granted ever since, while no particular land was described by the railroad grant, which was a *float*, to be determined by the choice of the line of the road in future.

The court in both cases held that the lands passed under the swamp-land grant and were excepted from the grant to the railroad.

In *Schulenberg* v. *Harriman* (21 Wall., 44), where grants were made to the State of Wisconsin to aid in the construction of railroads, the defendant, as agent of the State, took possession of certain timber which had been removed from the land. Plaintiff thereupon brought an action of replevin. The railroad had not been constructed, and the granting act provided that within a certain time (which had elapsed) the lands should revert to the grantor if road was not completed. It contained the usual language of present grant and excepted lands sold by the United States or to which preemption claims had attached at date when road was "definitely fixed." The route had been surveyed and

a map filed. No action having been taken by the grantor looking to a forfeiture, the State was held to have title in trust for the purposes enumerated in the granting act. The cases above mentioned were referred to by the court, which said (p. 60), Mr. Justice Field delivering the opinion:

> That the act of Congress of June 3, 1856, *passed a present interest* in the lands designated there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is "*that there be, and is hereby, granted* to the State of Wisconsin" the lands specified. The third section declares "that the said lands *hereby granted* to said State shall be subject to *the disposal* of the legislature thereof;" and the fourth section provides in what manner sales shall be made, and enacts if the road be not completed within ten years "no further sales shall be made, and the lands unsold shall *revert* to the United States." The power of disposal and the provision for the lands reverting both imply what the first section in terms declares, that a grant is made, that is, that the title is transferred to the State. It is true that the *route of the railroad*, for the construction of which the grant was made, *was yet to be designated, and until such designation the title did not attach to any specific tracts of land.* The title passed to the sections to be afterwards located; *when the route was fixed their location became certain*, and the title, which was previously imperfect, acquired precision and became attached to the land.

No general route map was required.

In *Leavenworth, etc., R. R.* v. *United States* (92 U. S., 733) it was held that where the right of an Indian tribe to the possession and use of certain lands as long as it may choose to occupy the same is assured by treaty, a grant of them by Congress to aid in building a railroad violates an express stipulation, and a grant in general terms of "land" can not be construed to embrace them.

The original Indian treaty was made in 1825, but by a treaty of 1865 the Indians conveyed certain of their lands to the United States. This treaty was proclaimed in 1867.

The railroad granting act was in 1863. In 1871 an act was passed by Congress to enable the grantee to relocate a portion of its road, and in the same year the governor certified that the road had been constructed and equipped as required by the act of Congress. The lands were then listed to the State, which thereupon issued to the appellant patents for those involved in the bill of complaint.

Referring to the grant the court said:

> It creates an immediate interest, and does not indicate a purpose to give in future. "There be and is hereby granted" are words of absolute donation, and import a grant *in præsenti.* This court has held that they can have no other meaning, and the land department on this interpretation of them has uniformly administered every previous similar grant. (*Railroad Company* v. *Smith*, 9 Wall., 95; *Schulenberg* v. *Harriman*, 21 id., 60; 1 Lester, 513; 8 Opin., 257;

11 id., 47.) They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then became certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of the road should be definitely fixed.

And further:

> We have before said that the grant itself was *in præsenti*, and covered all the odd sections which should appear, on the location of the road, to have been within the grant when it was made. The right to them did not, however, depend on such location, but attached at once on the making of the grant. It is true they could not be identified until the line of the road was marked out on the ground; but, as soon as this was done, it was easy to find them.

The Indian lands were also held to come within the proviso to the granting act that any and all lands heretofore reserved to the United States are excepted from the grant, and that they subsequently became a part of the public domain was held to be immaterial.

None of the acts considered in the cases above mentioned provided for the filing of a map of general route.

The case of *Missouri, Kansas and Texas Railway Company* v. *Kansas Pacific Railway Company* (97 U. S., 491) considers the grant to the railroad then known as the Kansas Pacific, which provided for the filing of

such a map. But the effect of filing it was not even mentioned in the opinion. The suit was between two railroads. The court held that the rights of the railroad companies were determined by the dates of their respective grants. In so doing it took occasion to say, referring to the grant to the M., K. & T. Ry. Co. (which did *not* require a general route map), that—

> The act of July 1, 1862, passed to the company a present interest in the lands to be designated within the limits there specified. Its language is, "that there be and is hereby granted" to it the odd sections mentioned—words which import a grant *in præsenti* and not one *in futuro*, or the promise of a grant. Similar terms in other acts of Congress granting lands have uniformly received this interpretation, unless accompanied with clauses restraining their operation. They were so interpreted in *Schulenberg* v. *Harriman*, after full consideration of previous adjudications on their import; and the ruling there was followed in *Leavenworth, Lawrence and Galveston Railroad Co.* v. *United States* (92 U. S., 733). It is true that the route of the road, in this case as in those cases, to aid in the construction of which the act was passed, was to be afterwards designated; and until designated the title could not attach to any specific tracts. The grant was of sections to be afterwards located, and their location depended upon the route to be established; when that was settled, the location became certain, and the title that was previously imperfect acquired precision and attached to the lands

In *Railroad Company* v. *Baldwin* (103 U. S., 426) it was held that the grant to the St. Joseph and Denver City Railroad Company of land "to the extent of 100 feet in width on each side of said road where it may pass through the public domain," without reservation or exception, is absolute and *in præsenti*, and a party subsequently acquiring a parcel of such lands takes it subject to that right. The plaintiff's right to the land attached prior to the definite location, but subsequent to the date of the grant. The court said:

> The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. "There is hereby granted" are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act to the sections, except such as are taken from its operation by the clauses mentioned. This is the construction given by this court to similar language in other acts of Congress. (*Missouri, Kansas and Texas Railway Co.* v. *Kansas Pacific Railway Co.*, 97 U. S., 491; *Leavenworth, Lawrence and Galveston Railroad Co.* v. *United States*, 92 id., 733.)
>
> But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the Government with respect to the public lands which would call for any qualification of the terms. Those lands would not

> be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.

And it held the plaintiff not entitled to damages from the railroad company for entering his land and appropriating the right of way. No general route map was required.

In *Grinnell* v. *Railroad Company* (103 U. S., 739), subsequent settlers sought to acquire rights to the land on the theory that the railroad title had been divested by a change in location of a part of the road, such change being under authority of Congress. After the change the lands in question fell without the original place limits. The court's decision was adverse to the claims of the settlers. It said:

> The grant under the act of 1856 was, as has been often said, a grant *in praesenti*, and though exactly what this means has been the subject of much controversy, we think its ascertainment is not difficult. The only doubtful element of the problem is the location of the road, which, by the terms of these grants, is necessary to identify the sections granted on each side of it. *Whenever that is done so that a surveyor or the officers of the Land Department can protract the line of the route on the maps of the public lands within the limit of the grants, the identity of the lands granted is mathematically ascertained, and the title relates back to the date of the grant.*
>
> So far as lands are found in place when this is done, not coming within the exceptions as

> sold or held under preemption, the title, or at least the right to this land in place, is at once vested in the State or in the company to which the State has granted it, and the means of ascertaining precisely what lands have passed by the grant is to be found in the map of the line of the road, which is filed in the General Land Office under provisions of the statute.

The granting act did not provide for any map of general route, but contained the usual provision making exceptions from the grant when the route was "definitely fixed."

In *Van Wyck* v. *Knevals* (106 U. S., 360), Mr. Justice Field, delivering the opinion of the court, said:

> The principal question for determination in this case is, When does the grant made to Kansas by the act of Congress of July 23, 1866, c.212, for the use and benefit of the St. Joseph and Denver Railroad Company in the construction of a railroad from Elwood, in that State, to its junction with the Union Pacific Railroad, or a branch thereof, to take effect so as to cut off the right of preemption from subsequent settlers on the land? The grant is similar in its main features to numerous other grants of land made by Congress in aid of railroads, and contains the same limitations, or, rather, exceptions to it.

There was no general route map provided for, and the court held as follows:

> The grant was one *in praesenti*, except as its operation is affected by that condition; that is, it imports the transfer, *subject to the limitations*

mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identification until the route of the road is "definitely fixed." When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of Congress. In that sense we say that the grant is one *in praesenti. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, and passes the title as fully as though the sections had then been capable of identification.*

St. Paul v. *Winona Railroad* (112 U. S., 720) is a contest between two railroad companies. The decision goes no further than to hold that priority of grant, and not priority of location, gives priority of title, and that lands falling within conflicting limits of grants to different companies under the same granting act are taken by the companies in equal undivided moieties. No general route map was mentioned.

The granting act in *Kansas Pacific* v. *Dunmeyer* (113 U. S., 629) provided for a general route map. It contained the usual exceptions as of the date of definite location, however, and the court simply held that the subsequent failure to comply with the acts of Congress concerning residence, etc., by a settler who went on the land prior to definite location and remained until after it does not cause the land to revert to the railroad company and become a part of the grant.

Walden v. *Knevals* (114 U. S., 373) was a case similar in some respects to *Van Wyck* v. *Knevals* (106 U. S., 360). The determinative question was as to the time when the road became "definitely fixed," and the court held that it was so fixed when the map of the route adopted by the company was filed with the Secretary of the Interior. A settler who initiated his claim subsequent thereto had a right inferior to that of the company. There was no general route map provided for.

In *Wisconsin Central Railroad Co.* v. *Price County* (133 U. S., 496) the court held that lands within the place limits of the plaintiff were subject to taxation by the State, notwithstanding the fact that patents had not yet been issued by the Government, but that indemnity lands which had been selected by the company and such selection not yet approved by the Secretary of the Interior were not subject to taxation by the State.

Mr. Justice Field, delivering the opinion of the court, in discussing the question when the title of the railroad company became such as to subject its lands to taxation, said:

> The title conferred by the grant was necessarily an imperfect one, because until the lands were identified by the definite location of the road it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, a float. But when the route of the road was definitely fixed the sections granted became

susceptible of identification and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims. (*Schulenberg* v. *Harriman*, 21 Wall., 44, 60; *Leavenworth, etc., Railroad* v. *United States*, 92 U. S., 733, 741; *Missouri, Kansas and Texas Railroad Co.* v. *Kansas Pacific Railway Co.*, 97 U. S., 491, 496; *Railway Company* v. *Baldwin*, 103 U S., 426, 429.) The road having been built as early as June, 1877, and supplied, as required, with the appurtenances specified, the company was entitled to have the restrictions upon the use of the land released. It had then to the eleven 40-acre parcels which were capable of identification an indefeasible right or title; it matters not which term be used. The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it.

The granting act did not provide for any general route map.

In the case of *St. Paul and Pacific* v. *Northern Pacific* (139 U. S., 1), it appeared that the grants to the St. Paul and Pacific, so far as they formed the subject of that controversy, were subsequent in date to the act under which the Northern Pacific claimed, and that, therefore, they came under the well-settled rule that where different grants cover the same premises the elder takes the title.

Mr. Justice Field, speaking for the court, said:

> The language of the statute is "that there be, and hereby is, granted" to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future.
>
> The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in praesenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.
>
> This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. (*Schulenberg* v. *Harriman*, 21 Wall., 44, 60; *Leavenworth, Lawrence, etc., Railroad Co.* v. *United States*, 92 U. S., 733; *Missouri, Kansas, etc., Railway Co.* v *Kansas Pacific Railway Co.*, 97 U. S., 491; *Railroad Co.* v. *Baldwin*, 103 U. S., 426.) The terms of present grant are in some cases qualified by other portions of the granting act, as in the case of *Rice* v. *Railroad Company* (1 Black, 358); but unless qualified they are to receive the interpretation mentioned.

It was contended that there were certain qualifications in the Northern Pacific grant which excepted it from the general rule, but the court held otherwise.

In *Deseret Salt Co.* v. *Tarpey* (142 U. S., 245) the controlling question under discussion was whether upon filing and acceptance of map of definite location a lessee of the company could maintain an action for the premises. It was contended that the grant was only a promise of title when the work was completed and that until then possession of the lands can not be claimed. No general route map was provided for. The court, referring to *Rutherford* v. *Green*, *Schulenberg* v. *Harriman*, *Leavenworth*, *etc.*, *Railroad* v. *United States*, and *Wisconsin Central* v. *Price County*, above mentioned, said:

> The terms used in the granting clause of the act of Congress and the interpretation thus given to them exclude the idea that they are to be treated as words of contract or promise rather than, as they naturally import, as words indicating an immediate transfer of interest. The title transferred is a legal title as distinguished from an equitable or inchoate interest.

And held that:

> From the view of the interest conveyed by the grant which we have expressed we are satisfied that the company could maintain an action for the possession of the premises in controversy and that its lessee, the plaintiff herein, was possessed of the same right. The judgment must therefore be affirmed.

In *Sioux City, etc., Land Co.*, v. *Griffey* (143 U. S., 32), the plaintiff, claiming under a grant to the State to aid in the construction of a railroad, sought to recover a tract claimed by the defendant under a patent from the United States based on a preemption claim initiated prior to definite location. The plaintiff contested the bona fides of the preemption settlement. No general route map was required. The court adhered to the now well settled doctrine that while the grant is *in praesenti*, tracts subject to the claims mentioned in the language of exception as of date of definite location do not pass to the company, and denied to the plaintiff the right to go into the bona fide character of the claim or settlement made prior to definite location.

In *United States* v. *Southern Pacific* (146 U. S., 570), where certain tracts covered by the grant to the Atlantic and Pacific Company, as identified by its map of definite location, fell also within a subsequent grant to the Southern Pacific, it was held that the prior grant determined the title. The court speaks of the map of definite location as identifying the tracts which were to pass *in praesenti* under and as of the date of the grant. The granting act required no map of general route. Had it done so, and nothing further been done after filing it, there seems to us to be no reason which would prevent the court from holding, in accordance with this decision, that the map of general route identified the lands sufficiently for the purposes of the grant, and that in every other instance than those claims and the like which are expressly excepted from the grant as of the date of definite

location, the title of the railroad becomes attached to particular lands upon filing the map of general route. The general route map identifies the land. That the route may be subsequently changed is not important. If it should be so changed that lands falling within it would not fall within the new route, this need not be fatal to the title already passed to the company. (*Grinnell* v. *Railroad, supra.*) It is but just to the railroad to hold that it gets some rights by filing a general route map when it is required by statute to file one. It publishes to the world the probable line of its route. Are others to profit by that information at the expense of the company? Certainly not With certain enumerated exceptions as of date of definite location it seems to us title of company then passes *in præsenti* as of date of grant. (*Railroad Company* v. *Baldwin, supra.*) The company acquires no more of a title to its right of way than to its place lands.

We do not ask, however, and it is not necessary that the court go so far in this case. We simply contend that upon filing the general route map the railroad company acquires to the lands thus identified a title good as to all the world except the *power* of Congress as of the date of the grant, with the certain exceptions named in the clause of reservation and there expressly provided to take effect or be ascertained upon definite location. Certainly the general route map must be given some effect. What other effect would it have if it has not that here claimed for it?

When the grant of 1870 was definitely located the grant of 1864 was not a float, but an effective grant of particular lands.

These cases show how the doctrine has been developing and gaining momentum since its inception. In the first cases the lands had only to be located and title immediately passed *in praesenti* as of date of grant. The grant was referred to as a "float." In a sense it was one. Its location served to give it precision and had no greater effect.

Then came an application of the general doctrine to specific railroad grants. The granting acts did not require any map of general route. *There was but one fixing of the route.* The map filed came to be called a map of *definite location*, that is, a map which accomplished the "definite fixing," and as the grants provided for excepting certain tracts at the date when the road became definitely fixed, the court came to refer to the grants as being *in praesenti*, but not attaching to any lands for any purpose until definite location. This was only in general language, however, used in controversies with people whose tracts were undoubtedly excepted as of the date of definite location under the express provisions of a clause taking them out of the grant as of that date. The grant was to be absolutely *in praesenti* as to everything else and for every other purpose. In *Railroad Company* v. *Baldwin* (*supra*) there was a grant of a right of way to a railroad company without any such exceptions as of the date of definite location. A settler's rights had attached prior to definite location, but the court held the

grant to be one absolutely *in praesenti*, and, notwithstanding the claims of the settler, held the railroad to have the superior right.

In the earlier cases, the words "definitely located" or "definitely fixed" are found. They did not and do not mean the technical definite location provided for in subsequent grants. They were not used in opposition to maps of general route, for there were none. They meant simply a location more definite than the grant itself contained. In a sense the road was located by the grant. Its termini were usually fixed thereby. There had to be a location of some kind beyond that contained in the grant, and it was referred to as being "definite" to distinguish it from the less definite location contained in the grant.

This was the status of the decisions when a grant providing for a map of general route came up for consideration. The effect of filing such a map, however, did not enter into the case and the court very naturally continued to refer to definite location as the time when title passed to company. It had in mind the definite location it had previously considered. That location was no more *definite* than is that now secured under a general route map. The court has held that the definite location may be changed; that the road need not be constructed along that location, and still a settler can not complain. (*Grinnell* v. *Railroad Company*, *supra*.) A definite location, then, did not at the time convey to the court or to anyone else the idea of a fixed and unchangeable thing. It meant only such a location as would attach the grant to *some* definite

lands, which the general language of the granting act did not. The general route map serves that same purpose. It fills the office which the court in the beginning ascribed to an act which it, for lack of any better term, called "definite location."

The effect to be given to the filing of a general route map now becomes important, and it seems to us the court might without inconsistency hold that, as to all things (other than those expressly covered by the proviso saying that they shall attach if they have been initiated prior to definite location) the grant is *in præsenti* and attaches from its date, only requiring a fixing to give it a degree of certainty, and that upon such fixing, which occurs when general route map is filed, title of company becomes vested and can be divested only by act of the grantor.

The case of *Menotti* v. *Dillon* (167 U. S., 703) would not be inconsistent with a holding as suggested. There the court was of opinion that Congress intended an act of repose to grant the lands, notwithstanding they fell within the place limits of the first grant, and that Congress had power to do this. That case distinctly holds that the order of withdrawal on general route "took these lands out of the public domain as between the railroad company and individuals, but they remained public lands under the full control of Congress." The court say:

> The right acquired, in virtue of the act making the grant and of the accepted map of its general route, was to earn such of the lands, within the extension lines of *that route*, as were *not* sold,

reserved, or disposed of, or to which no preemption or homestead claim had attached, at the time of the definite location of its road.

Most of the cases referred to above were cited in the case of *United States* v. *Oregon, etc., Railroad Company* (176 U. S., 28, 42), and they are sufficient to illustrate the growth of the doctrine that a grant is and must be a float until it is attached to particular land. We now contend that for some purposes the grant attaches to particular lands when the general route map is filed, and that for others it remains a float until definite location, because the grant itself so provides.

To recapitulate, then, a careful analysis of the decisions above referred to shows:

1. That the grants are absolutely *in præsenti* as of date of grant, with this exception, that certain lands covered by certain claims or rights at the definite location are excepted expressly as of that date.

2. That any fixing of route more definite than that contained in the grant was originally called a "definite location" or "definite fixing." Of course, something of that sort was physically necessary to attach the grant to any specific tract.

3. When later grants came along providing for both "general route" and "definite location," the court continued to speak of definite location as the time when the grant ceased to be *a float*. In the particular instances, it had under consideration lands which the excepting clause excepted *as of the date of definite location.*

4. Aside from such excepting clause, the general route map performs the same office as that at first attributed to a thing called "definite fixing" or "definitely locating," or simply "locating."

5. We now have a case where the filing of the general route map becomes important, and we do no more than ask the court to adhere to the doctrine it has been announcing and go one step further and hold that upon filing map of general route the railroad acquires a claim or right to the land, good as against all the world other than certain persons permitted by the excepting clause of the act to come in up to a later date specified, and except generally as to the power of Congress by express legislation to dispose of the lands.

The rights granted and vested under the act of 1864 were forfeited in such a way as to benefit the Government and not to cause the enlargement of other grants.

The forfeiture act of 1890 provides that it shall not be construed to enlarge the area of land originally covered by any grant, or to confer any right upon any State, corporation, or person to lands which were excepted from such grant, and that the moiety of lands granted for a main and branch line, when but one is completed, inure to the benefit of the completed line. There can be no doubt that by this act the Northern Pacific Company lost its rights under the grant of 1864, or that up to that time it had rights in and to particular lands under that grant which, if it had in 1889 with governmental acquiescence proceeded to

build east from Portland, would have given it the lands in question by an absolute title. The grant of 1864 was *in præsenti* and located upon particular lands. While homestead occupants were not forbidden to settle upon these, yet the grant was certain after 1870, and title fully passed as against all those not expressly permitted by the granting act to come in before definite location. As between the Government and company and other companies it was a finally located grant of lands. Does not the contention of the other side lead to an enlargement of the area of the grant of 1870 by the act of 1890? This is forbidden.

The actual Oregon and California decision and a hypothetical remark about the Perham map and the power of Congress.

7. Owing to the nature of the Perham map (which was explained and discussed in the case of *U. S.* v. *Oregon & Cal. R. Co.* (176 U. S., 28, and in effect held to be worthless in *Doherty* v. *N. Pac. R. Co.*, 177 U. S., 421), and the absence of a withdrawal of lands, the lands involved in the Oregon case were naturally held to pass to the Oregon Company. But the decision in that case is accompanied by a remark upon a mere hypothetical case which should not, we respectfully submit, be held to overrule well-considered decisions in other cases. Had the Perham map been actually a map of general route, which the court did not consider it, then, following the logic of these other decisions, while it would not have precluded the *power* of Congress to grant the lands, yet we are led to four obvious consequences.

The first is that the language of the Oregon grant should be and would have been carefully examined in search of the Congressional intent to grant or not the lands there in question. This the court did not feel it necessary to do in the other case. It devoted four or five pages to establishing that the lands *could*, notwithstanding the hypothetical general route map, be granted by Congress; but the intent to grant them is not examined into or even mentioned. The court merely remarks that "being within the limits of the Oregon grant" they were granted, and speaks of their not being "appropriated." But, on the hypothetical case, the mere exterior limits or boundary of the grant can not be treated as conclusive without overruling *No. Pac. R. R. Co.* v. *Musser-Sauntry Co.* (168 U. S., 604, 608).

The Oregon grant excepted lands within the limits that were "reserved." In the case cited it is clearly held that lands withdrawn under a good map of general route are "reserved" and do not pass under such a grant, and the *Buttz case* (119 U. S., 55) holds that such a map, by operation of law, withdraws and thus reserves them. The Buttz case is not overruled, but only held not to exclude the *power* of Congress to grant withdrawn lands.

The second point is that, aside from the express exception of reserved lands, there is nothing in the Oregon grant to give it the unusual intent of granting to the second grantee lands withdrawn by or under a good map of general route for a prior grantee. There is nothing peculiar in the circumstances or facts to in-

dicate such an intent. Consequently, to hold, in the hypothetical case of a good map of general route, that such an intent existed would be to overrule *St. Paul and Pac. R. R. Co.* v. *No. Pac. R. R. Co.* (139 U. S., 1, 17), where the court say:

> Besides, the withdrawal made by the Secretary of the Interior of lands within the 40-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed 40 miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry, or preemption before or after they were surveyed except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road.
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> * * * * *
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> After such withdrawal no interest in the lands granted can be acquired against the rights of the company except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed.

The court has since held that homestead occupants up to definite location were recognized by the granting act as entitled to take the lands they "occupied," especially in view of an act of 1880 concerning settlers on railroad lands, and in view of the unsurveyed condition of the vast area through which the Northern Pacific was to pass, but that is a wholly different question and between very different parties. That was a mere construction of the excepting clause in the grant which expressly includes "lands occupied by homestead settlers."

The third proposition, relating to the hypothetical case of a good Perham map and withdrawal in 1865, is that the court would, in allowing the Oregon road to get a grant at Portland by a grant of 1866, be overruling the general doctrine, so well settled, that a doubt is fatal to the grantee. "Silence is negation and a doubt is fatal to the claim." *Fertilizing Co.* v. *Hyde Park*, 97 U. S., 659; *Pearsall* v. *Great Northern Rwy. Co.*, 161 U. S., 1; *Atlantic and Pacific R. R. Co.* v. *Mingus*, 165 U. S., 429; *Leavenworth R. R.* v. *U. S.*, 92 U. S., 740; *Dubuque and Pac. R. R. Co.* v. *Litchfield*, 23 How., 66, 88.

The fourth proposition is that only "public lands" are taken by a railroad grant (*U. S.* v. *South. Pac.*, 146 U. S., 570, 606), and as the court does not overrule the Buttz case, a hypothetical good Perham map of general route would withdraw the lands; that is, make them cease to be public lands, although, nevertheless, expressly permitted to be taken up by homestead

occupants, etc. This is one reason why there must be express and exceptional language to grant withdrawn lands.

This court, in giving to the Oregon case all the consideration the actual facts justified, neither intended to overrule nor even considered the propriety of overruling any of these four doctrines directly involved and laid down in other cases, not once but repeatedly.

The hypothesis of the Perham map being a good map of general route, is made incidentally and only in connection with the *power* of Congress. There is no evidence that it received any further consideration, and we have a right to believe that the court considered the map, as it soon after held it to be, insufficient. The intent of Congress in the grant of 1866 is not *discussed at all*, still less considered in all possible phases of the hypothetical case.

We say, therefore, that the actual decision in the actual case before the court may be regarded as authority, but that there is no reason for regarding the hypothesis as having any bearing on the present controversy. The actual case certainly has none.

To treat an incidental hypothesis which is introduced *arguendo* in discussing the power of Congress, as introduced for all purposes, not only in that but other cases, and thereby make the court inferentially overrule doctrines it had settled and was not considering, is far from the proper employment of previous decisions as authority. No better road can be taken to the establishment of bad law. The hypothesis was considered

only in the connection in which it was spoken of—the power of Congress. But, fortunately, we are now before the same tribunal which decided that case, and the question is not what was said there about a supposition made incidentally, but what is the law which should be applied here to a different set of facts. If anything was "too broadly" expressed there, this court will not hesitate to limit it, as it did the expressions in the Buttz case. If any expressions were used which can be understood as overruling four of the best settled doctrines of the court, then the court will say, as the fact was, that it had no such intention, and that the doctrines are sound, whether it had it or not.

In the matter of the Northern Pacific Railroad Company (31 Land Decisions, p. 34) the Secretary of the Interior says:

> Applying this ruling to the lands in question, they were at the time of the grant to the Northern Pacific Railroad Company included within an existing and lawful withdrawal made in aid of a prior grant and were therefore not subject to sale or other disposition under general laws. They were not "public lands" within the accepted meaning of those words (*Barker* v. *Harvey*, 181 U. S., 481, 490) and were not within the terms of the grant to the Northern Pacific Railroad Company, which was of "every alternate section of *public land*." While the decision in the case of *United States* v. *Oregon and California Railroad Company* (176 U. S., 28), cited by appellant, gives color to appellant's contention, it must be remembered that *in that*

case the lands in controversy *were not reserved* under the prior grant or at all until after the date of the later grant under which they were held to have passed. They *were public lands* at the time of the later grant which was held to have embraced them. The case of *Bardon* v. *Northern Pacific R. R. Co.*, *supra* (145 U. S., 535) and kindred cases were not referred to in the opinion of the court, and it can not be presumed that by any general discussion upon an immaterial point the court intended to overrule the Bardon and kindred cases.

General remarks.

We say, then, in conclusion—

1. The intent of the resolution of 1870 to grant the lands in question is the point to be decided. That intent is to be ascertained from the language of the resolution, read in the light of the circumstances existing and contemplated as to come into existence, when the resolution was passed.

2. The language differs from that of the grant to the Oregon and California Company in that it concerns only lands absolutely free from rights and claims at the time of definite location.

3. The language differs in that it is based upon, connected with, and supplements the grant of 1864 to the same grantee for one road.

4. The subject-matter differs in that it includes a continuous road to be constructed by the same grantee via a given point, and not a rival road to such a point.

5. The circumstances differ in that there was no map of general route in 1866–1869 in the other case, but only the worthless Perham map, and in the present case, before the definite location, there was a good map of general route and a requested withdrawal of the lands duly made.

That it is proposed here not to permit a diligent rival to acquire lands that were free public lands when it definitely located, but the same grantee to acquire lands under a second grant by alleging his failure to perform his contract under the first, although it appears in many ways that his second grant was not intended to cover the lands. This is not equitable or reasonable, and the court should exert its ingenuity, if needed, to prevent such a result.

That the practical view of the Congressional intent shows that a point on the Columbia River north of Portland, or Portland itself, was, for commercial and business reasons, what Congress intended as the terminus of the first road and point from which it was to go north; that subsequent proceedings show that the company so understood; that the company in 1870 by a good map selected the point; that there has never been a suggestion of any other point, except Portland itself, as contemplated by the company or the Government from 1864 to this time, and that the lands in question lie within any map that could have been made after 1870 of the grant of 1864. That Congress knew this and that consequently the court knows the lands were not intended to be granted by the resolution of

1870 for the continuation of the road to Puget Sound. Knowing this, the court is not justified in reasoning from other cases to a conclusion which defeats the obvious intent of the law and the parties to this transaction, but should in some way carry out that intent.

That the map of 1870, when the resolution of 1870 passed, was expected by Congress to be filed and to fix the point at or near Portland, as between the only possible alternative points.

The company should not be permitted at this late day to get these lands by alleging that it might have chosen one of the other points, which would slightly vary the boundary of the first grant, but would not withdraw these lands from it. It got all the benefit of its selection and should not now be permitted to injure the Government and settlers by alleging that it might possibly have changed its mind, when it did not do so and ceased to have a right to do so.

A gives B 40 acres of his farm, B to provisionally select them, with the right within a year to change the boundary and get full title, forfeitable for nonpayment of the price.

He then tells B he may have on like terms land lying north of his first land and beginning where that ends. B provisionally fixes the 40 acres, makes no change within the year, and forfeits his rights as to them. Would he be permitted to say that, as the second grant was to begin at the north end of the first and no final boundary was fixed or title passed to them, he could not find any such boundary, and therefore

should take all the 40 acres as part of his second grant?

That it may well be held that the second granting act fixed Portland as the end of the road from Puget Sound and consequently the point on the continuous road from which it was to go east, which, if not amounting to a definite location as against third parties, yet, as between the Government and the company, sufficiently shows that these lands were not intended to be within the limits of the second grant.

The like might be said, substituting Fort Vancouver for Portland.

That the *quantity* of lands we contend to be cut out of the second grant must have been intended to be cut out, and the court should seize upon some of the many reasons, including estoppel, for treating the lands in suit as a part of the quadrangle of lands intended to be cut out, rather than fail to do justice and equity between the parties, and to the settlers who are on the land and have made improvements in good faith, unless, of course, the court can point out a still more probable quadrangle as intended to be cut out. But that would be impossible.

That a moiety of the lands, at least, belongs to the Government, as in the case of a main and branch line only one of which was constructed before 1890.

Respectfully submitted.

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